JUDICIAL COUNCIL OF CALIFORNIA
ADMINISTRATIVE OFFICE OF THE COURTS
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Report

TO: Members of the Judicial Council

FROM: Appellate Advisory Committee
Justice Joyce L. Kennard, Chair
Heather Anderson, Senior Attorney, 415-865-7691

DATE: August 26, 2003

SUBJECT: Appellate Procedure: Making Filing of an Answer to a Petition for Rehearing in the Court of Appeal Discretionary with the Court (amend Cal. Rules of Court, rules 25(b) and 29.5) (Action Required)

Issue Statement

The vast majority of petitions for rehearing are denied. Given the low probability that such a petition will be granted, many attorneys believe it is a waste of their time and their clients' money to file an answer to such a petition. However, out of caution, litigants routinely spend time and their clients' money to file answers to such petitions.

Recommendation

The Appellate Advisory Committee recommends that the Judicial Council, effective January 1, 2004:

1. Amend rule 25 to eliminate the automatic right to file an answer to a petition for rehearing in the Court of Appeal and instead provide that an answer may not be filed unless it is requested by the Court of Appeal; and

2. Amend rule 29.5 to clarify that the provisions of rule 25 concerning answers to petitions for rehearing do not apply in the Supreme Court.

The text of amended rules 25, and 29.5 is attached at pages 6-7.

Rationale for Recommendation

The Appellate Advisory Committee proposes that rule 25(b) of the California Rules of Court be amended to eliminate the automatic right to file an answer to a petition for rehearing in the Court of Appeal and to provide that answers be filed only when the court

requests them. This amendment, which is based on a suggestion from the California Academy of Appellate Lawyers, would have the effect of conserving litigants' resources in Court of Appeal proceedings by eliminating the perceived need for litigants to file answers to all petitions for rehearing. It would allow litigants to focus their resources on filing answers in those cases in which the Court of Appeal concludes that such an answer would be helpful.

The proposed amendment to rule 25(b) would provide that an answer must be served and filed within 8 days after the date of the court's order requesting an answer unless the court orders otherwise. To ensure that litigants are notified as quickly as possible when the court requests such an answer, rule 25 would also require the court to notify the respondent of the order by telephone or some other expeditious method.

The committee proposes this change only in the Court of Appeal, not in the Supreme Court. The committee believes that an appellant in a Supreme Court proceeding is less likely to be concerned about conserving resources and should be permitted to file an answer in all cases. Rule 29.5, however, through cross-references to rule 25, makes most of the Court of Appeal procedures for petitions for rehearing applicable in the Supreme Court. Therefore, the committee proposes that rule 29.5 be amended to clarify that the new procedures in rule 25 for answers to petitions for rehearing in the Court of Appeal do not apply in the Supreme Court. The proposed amendment to rule 29.5 would eliminate the cross-reference to new subdivision (b) of rule 25. It would also add to rule 29.5 a time frame for filing answers to petitions for rehearing, since this provision would be deleted from rule 25(c).

Alternative Actions Considered

The committee considered recommending that answers to petitions for rehearing be subject to the court's request in both the Court of Appeal and the Supreme Court. For the reasons just described, however, the committee decided to recommend this change only in the Court of Appeal.

The committee also considered recommending an extension in the date of finality when the Court of Appeal requests an answer to a petition for rehearing. As more fully discussed below, the committee ultimately concluded, however, that such an extension was not necessary.

Comments From Interested Parties

These proposed amendments were circulated as part of the spring 2003 comment process. Nine individuals or organizations submitted comments concerning this proposal. Overall, three commentators agreed with the proposal without suggesting any changes, four agreed with the proposal only if modified, and two disagreed with the proposal.[1]

[1] The full text of the comments and the committee's responses are in the chart attached at page 8.

The commentators raised two main concerns about this proposal. First, they questioned whether the 15-day time period from the filing of a petition for rehearing to finality would be long enough for the court or respondent to complete the steps required under this proposal. Second, they raised concerns about the sentence in the rule providing that the court will not ordinarily grant a petition for rehearing if it has not requested an answer to the petition.

Time to finality

The proposal that was circulated for public comment did not include an amendment extending the finality of the Court of Appeal's decision when the court requests an answer to a petition for rehearing. Five commentators – Mr. Saul Bercovitch commenting on behalf of the State Bar's Committee on Appellate Courts; Mr. Paul Fogel, who is a member of the Appellate Rules Revision Task Force; Ms. Cheryl Geyerman, Chair of the Appellate Court Committee of the San Diego Bar Association; Ms. Diana Herbert, commenting on behalf of the Appellate Court Clerk's Association; and Mr. Laurence Sarnoff from the Los Angeles County Public Defender's Office – raised concerns about there being inadequate time to complete all the tasks contemplated by the circulated proposal between the filing of a petition for rehearing and the time when the court must act on the petition.

As Mr. Bercovitch noted, a petition for rehearing must be filed within 15 days after the decision is filed. The court has the power to act on such a petition only until the decision becomes final - 30 days after the decision is filed. Thus, in the very likely scenario where a petition for rehearing is filed 15 days after the decision is filed, there would only be a 15-day window of opportunity for the court to act on the petition for rehearing. Under the circulated proposal, during that 15-day period the court would have to review the petition, determine whether to request an answer, and request an answer. The respondent would then need to prepare and file the answer within the same period (note that respondents currently have 8 days to file an answer from the date the petition for rehearing is filed). Finally, still within the 15-day period, the court would need to review and consider the answer. All of the commentators identified above questioned whether these tasks could be completed in an appropriate way during such a short period. In particular, Mr. Fogel and the State Bar Committee both suggested that this time frame would force the respondent either to prepare an answer in advance of the court's request—thereby defeating the proposal's underlying purpose of helping litigants avoid expending resources on unnecessary answers to petitions for rehearing—or to prepare an answer in haste, resulting in inferior answers in the very cases in which the Court of Appeal believes that an answer might be helpful.

Based on their concern about the inadequacy of this time period, both the State Bar Committee and the Appellate Court Clerk's Association believed that the proposal circulated as was impractical, and opposed its adoption. The other three commentators

who raised concerns about the adequacy of the time each suggested that the proposal be amended. Mr. Fogel suggested that the time for finality of the decision, and thus the time within which the court may act, should be extended by 15 days whenever the court requests that the respondent file an answer to the petition for rehearing. In addition, both Mr. Fogel and Ms. Geyerman suggest that rule 25(b)(2) be amended to require that if the court requests an answer, it do so by telephone or another quick method of contact.

The committee believes that, because the general practice in the Court of Appeal is to consider petitions for rehearing very expeditiously (usually within a few days of filing), it is possible for a court to request an answer from a litigant, give that litigant an 8-day period to file the answer— just as is now available under rule 25—and still have sufficient time to rule on the petition before the decision becomes final. Furthermore, if the court were pressed for time, it could grant the petition for rehearing, thereby extending finality and giving itself additional time to consider whether to change its decision. However, the committee concluded that many litigants would not be familiar with the courts' practice in this regard and thus would very likely begin preparing answers immediately, out of concern that they might be given less than 8 days to prepare an answer upon the court's request. As suggested by commentators, this would defeat the very purpose of this proposal.

To assure these litigants that they will have sufficient time to prepare and file an answer, the committee has modified the proposal to: (1) specify that the respondent will have 8 days to file the answer from the date of the court's order requesting that answer, unless the court orders otherwise; and (2) require that the court use the telephone or another expeditious method to inform the parties of the court's order requesting an answer. The committee included the "unless the court orders otherwise" language to take into account situations in which a late petition for rehearing or other circumstances result in there being only 8 days or less before finality, necessitating that any answer be filed more quickly.

Granting petitions without requesting answers

Three commentators — the State Bar Appellate Courts Committee; Ms. Jody Isenberg from the California Judicial Attorneys Association, and Mr. Sarnoff from the Los Angeles Public Defender's Office — raised concerns about the language in the proposal stating that "A petition for rehearing normally will not be granted if the court has not requested an answer." The State Bar Committee suggested that the grant of rehearing without an answer is likely to lead to an inferior—and potentially unjust—result with little or no corresponding benefit. They suggested that this provision be either deleted or replaced with more restrictive language, providing for the grant of such a petition "only in the most unusual circumstances." Ms. Isenberg questioned the usefulness of the proposed rule language, since it does not require the court to refrain from granting petitions unless an answer has been requested, and suggested that it would more be appropriately placed in an Advisory Committee Comment. Finally, Mr. Sarnoff

commented that, while he understands that it may be difficult for the court to obtain an answer within the time frame allowed, it appears inappropriate for the court to issue a new, perhaps modified, opinion without first obtaining a response to the petition. He therefore suggested that rule 25(b) be amended to provide that if rehearing is granted without an answer being requested, the court will allow the answer to be filed before issuing any further opinion in the matter.

The committee does not recommend any of the changes suggested by these commentators. The courts currently can, and do, grant (or deny) petitions for rehearing before receiving any answer to the petition. In some cases, this may be due to time pressures, in which case the court may grant the petition and seek supplemental briefing on the substantive issues before determining whether to modify its decision. However, as noted above, the committee believes that there will generally be sufficient time for a court to request and consider answers during the available time frame. A court may also grant rehearing before receiving an answer if the reason for rehearing is very clear from the petition or if the court identifies a reason for rehearing that was not raised in the petition. The committee believes that the courts should continue to have the flexibility to grant rehearing immediately in these circumstances. The proposed rule language is intended to recognize the usual circumstances in which an answer would be requested before a petition for rehearing is granted, while at the same time preserving the court's ability to grant petitions for rehearing without getting an answer. The committee believes it is appropriate to inform litigants of ordinary court practice in the rule itself, rather than in the comment; similar language is found in rule 29.3(a).

Implementation Requirements and Costs

There are likely to be some recurring new costs for the Courts of Appeal associated with determining whether to request answers from litigants when petitions for rehearing are filed, issuing orders requesting such answers, and informing litigants of these orders. However, Court of Appeal costs associated with receiving, filing, and reviewing answers to petitions for rehearing should be reduced, because such answers will be requested and filed in far fewer cases. This proposal should reduce costs for litigants.

Attachments

Rules 25 and 29.5 of the California Rules of Court are amended effective January 1, 2004, to read:

Rule 25. Rehearing

(a) * * *

(b) Petition and answer

(1) A party may serve and file a petition for rehearing within 15 days after:

(A) the filing of the decision;

(B) a publication order restarting the finality period under rule 24(b)(5), if the party has not already filed a petition for rehearing;

(C) a modification order changing the appellate judgment under rule 24(c)(2); or

(D) the filing of a consent under rule 24(d).

(2) ~~Any answer to the petition must be served and filed within 8 days after the petition is filed.~~ A party must not file an answer to a petition for rehearing unless the court requests an answer. The clerk must promptly send to the parties copies of any order requesting an answer and immediately notify the parties by telephone or another expeditious method. Any answer must be served and filed within 8 days after the order is filed unless the court orders otherwise. A petition for rehearing normally will not be granted unless the court has requested an answer.

(3) The petition and answer must comply with the relevant provisions of rule 14.

(4) Before the decision is final and for good cause, the presiding justice may relieve a party from a failure to file a timely petition or answer.

(c)–(d) * * *

Advisory Committee Comment (~~2003~~ 2004)

Revised rule 25 is derived from former rule 27.

Subdivision (a). * * *

Subdivision (b). The provisions of revised rule 25(b)(1)~~, (2),~~ and (3) are derived from subdivisions (b)~~, (c),~~ and (d), respectively, of former rule 27.

Former rule 27(b) provided only that a petition for rehearing could be filed within 15 days after the filing of the decision. In a substantive change, revised rule 25(b)(1) provides that a petition for rehearing may also be filed within 15 days after a postfiling order of the Court of Appeal publishing its opinion, a modification order changing the appellate judgment, or the filing of a consent to an increase or decrease in the amount of a money judgment; all are events that restart the 30-day finality period under revised rule 24. However, a party that has already filed a petition for rehearing may not file a second petition for rehearing after a publication order. (Revised subd. (b)(1)(B).)

~~Revised~~ Subdivision (b)(2), as revised in 2004, changes the~~ time for filing an answer to a petition for rehearing from 23 days after the *decision* is filed to 8 days after the *petition* is filed. It is not intended to be a substantive change: in the common situation in which the petition is filed on the 15th day after the decision is filed, the time to file the answer will be the same under both the former and revised rules. The change achieves a uniform rule governing the time to file an answer, whether the petition for rehearing is filed within 15 days after the decision or at a later time, e.g., after a modification of the appellate judgment or a postfiling publication order~~ procedures related to answers to petitions for rehearing. Instead of authorizing the filing of answers in all cases, this revised rule permits answers to be filed only when the court requests them.

Revised subdivision (b)(4) restates a provision of rule 45(c).

*** * ***

Rule 29.5. Rehearing

(a) * * *

(b) Petition and answer

A petition for rehearing and any answer must comply with rule 25(b)(1)~~, (2),~~ and (3). Any answer to the petition must be served and filed within 8 days after the petition is filed. Before the Supreme Court decision is final and for good cause, the Chief Justice may relieve a party from a failure to file a timely petition or answer.

(c)–(e) * * *

SPR03-03

Appellate Procedure – Making Filing of an Answer to a Petition for Rehearing in the Court of Appeal Discretionary with the Court
(amend Cal. Rules of Court, rules 25(b) and 29.5)

	Commentator	Position	Comment on behalf of group?	Comment	Committee Response
1.	Gloria Barnes Legal Process Clerk Superior Court of Santa Cruz County	A	N	No comment	No response required.

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2.	Mr. Saul Bercovitch State Bar of California Appellate Court Committee	N	Y	This proposal would amend rule 25 to eliminate the right to file an answer to a petition in the Court of Appeal, and, in its place, create a procedure for the filing of an answer only when requested by the court. While the Committee agrees that the stated purpose of this proposal-to eliminate unnecessary expense to appellate litigants who may feel obliged to file futile answers to a petition-is worthwhile, it is opposed to the proposal because, given the 30-day time period within which the court must act on a request for rehearing (Cal. Rules of Court, rules 24(a) and 27(a)), the proposal is impractical, and is unlikely to result in much savings because of the likelihood that parties will need to prepare an answer in any event. The proposal might also place an added burden on the Court of Appeal. Specifically, the court will need to rush to decide whether the petition is "answer worthy" within a shortened period, whereas under the current rule the court can use the entire 30-day period to decide whether to do anything. A petition for rehearing may be filed up to 15 days after the decision. (Cal. Rules of Court, rule 25(b)(1).) Under this proposal, in the 15 days thereafter (or longer in the unlikely event the petition for rehearing is filed early), the court must do the following: (1) receive that petition and determine whether it warrants an answer; and (2) if it does, the court must issue an order directing that there be an answer and specify when that answer is due. In that same 15-day period, the party opposing rehearing must prepare and file an answer. Given the likelihood that the court will not issue an order requesting an answer until at least several days after the petition is filed, parties may be forced to prepare an answer in	The committee believes that, because the general practice in the Court of Appeal is to consider petitions for rehearing very expeditiously (usually within a few days of filing), it is possible for a court to request an answer from a litigant, give that litigant an 8-day period to file the answer— just as is now available under rule 25—and still have sufficient time to rule on the petition before the decision becomes final. Furthermore, if the court were pressed for time, it could grant the petition for rehearing, thereby extending finality and giving itself additional time to consider whether to change its decision. However, to assure litigants that they will have sufficient time to prepare and file an answer, the committee has modified the proposal to: (1) specify that the respondent will have 8 days from the date the court's order requesting an answer within which to file the answer; and (2) require that the court inform the respondent of the court's order requesting the answer by telephone or other expeditious method.

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3.	Mr. Paul Fogel Reed Smith Crosby Heafy	AM	N	I write to comment on the proposed amendment to California Rule of Court 25(b)(2), which would prohibit a party from the filing an answer to a petition for rehearing the in the Court of Appeal unless the Court requests such an answer. I am a member of the California Academy of Appellate Lawyers, whose proposal formed the basis for the current proposed amendment to rule 25. The circulating proposed version differs, however, in one significant respect from the Academy's proposal, and in my view is ill advised. The Academy's proposal would have given the Court the power to determine whether it wished the prevailing party to file an answer to a petition for review. The circulating proposal adopts that suggestion. However, the Academy's proposal would also have delayed finality of the Court's opinion in such cases. The circulating proposal omits that change. Under the current proposal, the Court must receive and file the petition for rehearing, determine, whether the Court wants the other party to prepare and file and answer, inform that party of that fact, await that party's preparation and filing of the answer, and then act on the petition for rehearing, all within a 15-day period (The petition is not due until 15 days after the filing of the opinion, and the Court then has only 15 more days (less, if the petition couldn't be filed because the due date fell on a weekend or holiday) to act on it.) This seems ambitious and unnecessarily rushed.	The committee believes that, because the general practice in the Court of Appeal is to consider petitions for rehearing very expeditiously (usually within a few days of filing), it is possible for a court to request an answer from a litigant, give that litigant an 8-day period to file the answer— just as is now available under rule 25—and still have sufficient time to rule on the petition before the decision becomes final. Furthermore, if the court were pressed for time, it could grant the petition for rehearing, thereby extending finality and giving itself additional time to consider whether to change its decision. However, to assure litigants that they will have sufficient time to prepare and file an answer, the committee has modified the proposal to: (1) specify that the respondent will have 8 days from the date the court's order requesting an answer within which to file the answer; and (2) require that the court inform the respondent of the court's order requesting the answer by telephone or other expeditious method.

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	Commentator	Position	Comment on behalf of group?	Comment	Committee Response
4.	Mr. Robert Gerard President Orange County Bar Association	A	Y		No response required.
5.	Ms. Cheryl A. Geyerman Chair Appellate Defenders, Inc.	AM	Y	This amendment to rules 25(b) and 29.5 specifies that a party may not file an answer to a petition for rehearing tin the Court of Appeal unless the court requests an answer; the court will specify the deadline. We see a potential problem with the available time that may be left to file an answer before the court loses jurisdiction. If the petitioner files at or near the 15th day and then the court takes several days to ask for an answer, the remaining time for the answer to be prepared and the court to make a decision may be exceedingly limited. We, therefore, recommend that the rule require the Court of Appeal to alert the requested party by telephone, and email if available, as well as in writing that it wants an answer to the petition.	The committee believes that, because the general practice in the Court of Appeal is to consider petitions for rehearing very expeditiously (usually within a few days of filing), it is possible for a court to request an answer from a litigant, give that litigant an 8-day period to file the answer— just as is now available under rule 25—and still have sufficient time to rule on the petition before the decision becomes final. Furthermore, if the court were pressed for time, it could grant the petition for rehearing, thereby extending finality and giving itself additional time to consider whether to change its decision. However, to assure litigants that they will have sufficient time to prepare and file an answer, the committee has modified the proposal to: (1) specify that the respondent will have 8 days from the date the court's order requesting an answer within which to file the answer; and (2) require that the court inform the respondent of the court's order requesting the answer by telephone or other expeditious method.

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	Commentator	Position	Comment on behalf of group?	Comment	Committee Response
6.	Ms. Diana Herbert Appellate Court Clerk's Association	N	Y	We see a potential problem if a party sends in the rehearing petition on the last day. By the time the petition is a researched and two justices decide to grant review, we would have very little time to get out a request to opposing counsel to file an answer. The party preparing the answer wouldn't have much time to prepare their response.	See response to comments of Ms. Cheryl Geyerman above.

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	Commentator	Position	Comment on behalf of group?	Comment	Committee Response
7.	Ms. Jody L. Isenberg California Judicial Attorneys Association	AM	Y	Proposed rule 25(b) governs service and filing of petitions for rehearing and answers to such petitions. The Appellate Advisory Committee has proposed the rule be amended to eliminate the automatic right to file an answer to a petition for rehearing in the Court of Appeal and to provide that answers be filed only upon the court's request. As proposed rule 25(b)(2) provides: "A party must not file an answer to a petition for rehearing unless an answer is requested by the court. If the court requests an answer, the answer must be filed within the time specified in the request. *A petition for rehearing normally will not be granted if the court has not requested an answer."* (Emphasis added.) The CJAA agrees with the proposal to eliminate automatic answers to petitions for rehearing. However, we wish to comment on the emphasized language above pertaining to the court's practices. The discussion related to the proposal stated, "To address parties' potential concerns that the court could grant a petition for rehearing without the benefit of such an answer, the proposed amendment would also provide that the court ordinarily will not grant a petition [for] rehearing if it has not requested an answer to the petition." We question the usefulness of including the emphasized language in the actual rule of the court. The rule doest not require the Court of Appeal to request an answer before granting rehearing. The emphasized language creates an expectation that the court will adhere to a practice it is not require to follow. We suggest that the language in question would more properly be included in an Advisory	The committee is not recommending the changes suggested by this commentator. The proposed rule language is intended to recognize the usual circumstances in which an answer would be requested before a petition for review is granted, while at the same time preserving the court's ability to grant petitions for rehearing without getting an answer. The committee believes it is appropriate to inform litigants of ordinary court practice in the rule itself, rather than in the comment; similar language is found in rule 29.3(a).

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8.	Tina Rasnow Coordinator Superior Court of California, County of Ventura	A	N	There was positive comment about the change to the rule regarding responding a petition for rehearing. It was thought to be a good change to specify that no answer need be filed unless the court invites one.	No response required.

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9.	Mr. Laurence M. Sarnoff Assistant Public Defender Los Angeles County Public Defender	AM	N	While we understand the motivation behind the proposal in SPR03-03, we believe that one modification of the proposal is in order. The proposal prohibits filing an answer to a petition for rehearing unless one is requested by the Court of Appeal, and provides that "A petition for rehearing normally will not be granted if the court has not requested an answer." We understand that the need to rule upon a petition for rehearing before a decision becomes final could, in some circumstances, make it difficult for the court to obtain an answer before acting upon the petition for rehearing. However, it does not seem appropriate that the court could not only grant rehearing, but also issue a new, and perhaps modified, opinion thereafter without allowing a response to the petition for rehearing. Accordingly, we suggest that the proposal be modified to add the additional language, underlined below: "A petition for rehearing normally will not be granted if the court has not requested an answer. If rehearing is granted without an answer being requested, the court shall permit an answer to be filed before issuing any further opinion in the matter."	The committee is not recommending the changes suggested by this commentator. The courts currently can, and do, grant (or deny) petitions for rehearing before receiving any answer to the petition. In some cases, this may be due to time pressures, in which case the court may grant the petition and seek supplemental briefing on the substantive issues before determining whether to modify its decision. However, as noted above, the committee believes that there will generally be sufficient time for a court to request and consider answers during the available time frame. A court may also grant rehearing before receiving an answer if the reason for rehearing is very clear from the petition or if the court identifies a reason for rehearing that was not raised in the petition. The proposed rule language is intended to recognize the usual circumstances in which an answer would be requested before a petition for rehearing is granted, while at the same time preserving the court's ability to grant petitions for rehearing without getting an answer.